14

No. 4449

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD CHENERY, as administrator with the will annexed of the estate of Edith P. Chenery, deceased,

Plaintiff in Error,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Statement of the Case.

The facts in this case are not disputed and there is no conflict in the testimony. No evidence was offered on behalf of the defendant and the motion for a directed verdict was argued upon undisputed facts presented by the plaintiff. Our opponent's brief contains most of the salient features in the case but in order to simplify the argument we will restate the facts, supplying several features which have been omitted from the brief of the plaintiff in error.

Leonard Chenery, the plaintiff below, took out a policy of accident insurance in the defendant cor-

poration, paying an annual premium of twenty-five ($25.00) dollars for a policy providing for the payment of the principal sum of seventy-five hundred dollars ($7500.00) in the event of his death by accident and a weekly indemnity in case Chenery sustained a not fatal injury. The policy contained the customary provisions and benefits of accident insurance policies and was made payable to his wife, Edith Chenery, in the event of Chenery's death by accident.

In addition to the insurance of Chenery, the policy also gave a limited amount of accident insurance to the beneficiary. The insurance of the beneficiary is provided for in Section "H" of the policy (transcript pages 72-73). In substance the beneficiary endorsement provided for the insurance of Mrs. Chenery against bodily injuries sustained by accidental means "while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service" (transcript page 72).

Mrs. Chenery, the beneficiary in the policy, met her death in an automobile accident, and the only question involved is whether the automobile in which she was riding at the time was a "public conveyance * * * provided by a common carrier for passenger service".

The accident occurred in New Zealand where Mrs. Chenery had gone to visit her sister who lived on a large farm nine miles from Clevedon which was the nearest town. Mrs. Chenery and several others had

been on this farm and they left the farm on the day of the accident intending to return to Aukland which was a number of miles away. The journey could have been made in a motor boat by water but the launch was not available (transcript page 51) and the party decided to return to Aukland overland. The proposed trip was as follows:

To go from the farm to the nearest point on the highway—a distance of about three miles—by means of a cart or wagon driven by a native (transcript page 47). There was no regular means of transportation along the highway at that point so Mrs. Chenery, or some other member of the party, telephoned to the town of Clevedon which was nine miles from the farm and six miles from the point on the highway where the cart road intersected the highway; in Clevedon a man named Ward kept a garage and rented out automobiles, and by telephone they requested him to send out an automobile on the main highway and meet the cart or wagon at a point six miles east of Clevedon (transcript pages 38, 43). The party intended to take Ward's automobile on the highway and travel in it through Clevedon and then on to Papakura which was some ten miles beyond Clevedon. At Papakura they intended to take the train at 7:30 that night for Aukland. Ward was accustomed to run three busses a day between Papakura and Clevedon but he did not have any regular service to the east of Clevedon and only sent automobiles in that direction on receiving special calls (transcript page 39). Ward's

regular service between Clevedon and Papakura had been completed for the day. His regular runs between Clevedon and Papakura were three a day, the last automobile leaving at 3:30 in the afternoon and on the day of the accident all three of the automobiles had left on their usual schedule time. Consequently, the accident did not occur on one of his regular runs, but on this special trip, two hours after the last regular run for the day had been completed (transcript pages 40, 42, 43).

When Ward received the telephone call, he drove an automobile out along the main highway and met the cart or wagon coming from the farm (transcript page 34). Mrs. Chenery and the rest of the party dismounted from the wagon and entered Ward's Ford automobile and drove to Clevedon which was six miles away. The accommodations for the party in the Ford were so inadequate that upon reaching Clevedon Ward transferred them to a Dodge car that he owned (transcript page 35) and then started for Papakura where the party expected to take the train for Aukland that night. On this part of the trip, the automobile turned over the side of a bank and into a river and Mrs. Chenery was drowned.

It is our contention that she did not meet her death while a passenger on a public conveyance provided by a common carrier for passenger service as required by the policy. Conceding for the purposes of this argument that the operation of Ward's regular service between Papakura and Clevedon three times a day was that of a common carrier, it

is to be noted that this accident did not occur upon one of his regular runs but upon a special trip beginning six miles away from his regular run (transcript page 39) and occurred two hours after his last run for the day had been completed (transcript pages 40, 42, 43).

The testimony shows without conflict that as a part of Ward's business he was accustomed to give special service by special arrangement as in the case at bar just as livery stable keepers rented out carriages with drivers. Ward testified that it was pursuant to this branch of his business that he received the order and accepted the party for transportation to Papakura (transcript pages 44-45). In that behalf, Ward testified in substance as follows:

> "That it was his practise at the time of the accident to hire out cars for private use with drivers as part of his regular business and that it was pursuant to that branch of his business that arrangements were made to take Mrs. Chenery and party to Papakura (transcript pages 44-45). * * * This was a special trip and the charge was one pound fifteen shillings (transcript page 35). A special charge was made from Whakatiri (where the journey began) and a special fare ruled after the usual run from Clevedon to Papakura (transcript pages 35-6). This was not on the regular run (transcript page 38). It began six miles away from the regular run (transcript page 38). * * * He had no regular run of automobiles on the road where he picked the party up (transcript page 39). * * * The three regular trips from Clevedon to Papakura were at 7 a. m., 8:30 a. m. and 3:30 p. m. The last regular run on the day of the accident was 3:30 p. m. Mrs.

Chenery's party left at half past five in the afternoon (transcript page 40). He hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura (transcript page 41). He had automobiles at his garage to hire out privately in addition to automobiles used on the regular run (transcript page 41). A person could engage an automobile privately for transportation from Clevedon to Papakura (transcript page 42). The last regular run for the day was at 3:30 p. m. (transcript page 42). If the automobile involved in the accident had not been specially hired for the service, no automobile would have been sent from Clevedon to Papakura after 3:30 in the afternoon on the day of the accident (transcript page 43). He made the arrangements for the service by telephone (transcript page 43). All three of the regularly scheduled runs had left on the day of the accident before Mrs. Chenery left Clevedon. * * * It was his practise to hire out cars for private use with drivers as part of his regular business (transcript pages 44-45). It was pursuant to that branch of the business that arrangements were made to take Mrs. Chenery and party from the farm to Papakura (transcript page 45.

The trial court held that under these circumstances plaintiff was not entitled to recover, and this ruling, we submit, was clearly correct, and hence, that the judgment should be affirmed.

Argument.

I.

THE CONVEYANCE INVOLVED IN THE ACCIDENT WAS NOT A "PUBLIC CONVEYANCE PROVIDED BY A COMMON CARRIER FOR PASSENGER SERVICE". THE CASE IS IDENTICAL TO THE HIRING OF A CARRIAGE FROM A LIVERY STABLE KEEPER. WARD, THE DRIVER OF THE AUTOMOBILE, WAS ACTING AS A PRIVATE CARRIER AT THE TIME OF THE ACCIDENT.

The testimony in the case is undisputed. It shows that Ward had a daily service between Clevedon and Papakura, three times a day, and the last run starting at 3:30 in the afternoon. On the day of the accident all three runs had been completed, and assuming that Ward acted as a common carrier on the three regular runs, his obligations in that behalf were over on the day of the accident. He received the call to transport the Chenery party starting at a point that was six miles off from his regular run and he sent out an automobile specially for this particular service and for an agreed consideration of one pound and fifteen shillings (transcript page 35). As he testified, he was accustomed to accept special employment aside from the regular service that he operated between Papakura and Clevedon; and if the automobile involved in the accident had not been specially hired, no automobile would have been sent out to the farm, nor from Clevedon to Papakura after 3:30 in the afternoon (transcript page 43). Therefore, assuming that in making the three regular runs he operated as a common carrier, nevertheless in accepting the employment for spe-

cial trips Ward operated as a *private* carrier. As a common carrier upon his three regular runs, of course he was obliged to accept whoever applied and for a reasonable compensation uniformly charged to all passengers. But there was no obligation on his part to accept this special employment six miles off from his regular run and two hours after his last automobile had left. Judge Bourquin pointed out that this was determinative of the issue (transcript pages 57-64). As Ward was not obliged to accept a special employment off of his regular run and after his scheduled time, it follows that in accepting the Chenery party he was not acting as a common carrier but as a private one. A private carrier is at liberty to reject an offered service while a common carrier may not do so.

> "The distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage so long as there is room and no legal excuse for refusing while such duty does not rest upon the latter."

10 *C. J.* 607.

The issues involved in this case have been authoritatively settled by a decision of the Supreme Court in the case of

Terminal Taxicab Co. v. Kutz, 241 U. S. 252; 60 L. Ed. 984.

In that case it became necessary to determine whether a taxicab company operating in Washing-

ton, D. C., was a common carrier. It appeared that the taxicab company operated taxicabs from the Union Railway depot to the hotels and from the hotels to the depot. It also had a central garage where upon receipt of individual orders, generally by telephone, it would send out automobiles to furnish the requested service. The court held that in the first branch of the business, that is in operating between hotels and railway station, the Company was a common carrier; but it held that it was not a common carrier in furnishing service to persons telephoning to the garage. The latter service was likened to the old-fashioned service of a livery stable keeper which of course was not that of a common carrier. The court said:

> "The rest of the plaintiff's business, amounting to four-tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally. * * * The court is of the opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is

> passed. But, however, it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. * * * In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

Accordingly, it was held that in the second branch of its business the taxicab company was not acting as a common carrier and was not subject to the jurisdiction of the Public Utility Commission of the City of Washington. So in the case at bar, even though Ward was a common carrier in the branch of his service covering the three regular runs between the towns of Papakura and Clevedon, in the other branch of his business where he sent out automobiles on special orders he was a private carrier. The decision of the Supreme Court is decisive of the issue.

While the *Terminal Taxicab* case did not involve any question of insurance, the principle involved controls the case at bar for the issue involved in this case is whether Ward was acting as a private carrier or a common carrier at the time of the accident. Applying the decision in the Supreme Court case, it necessarily must be held that Ward was operating as a private carrier.

The principle involved in the Supreme Court case has been applied to insurance cases identical to the one now before the court. In the case of

Georgia Life Insurance Co. v. Easter, 66 Southern 514 (Alabama),

the Harris Transfer & Warehouse Company was concededly a common carrier of both freight and passengers, but sometimes it accepted employment in hiring out its conveyances for special services, and on one occasion accepted employment to take out a party to a picnic in one of its wagons. The plaintiff in that case was injured on the trip and made a claim against the insurance company by virtue of a provision in his policy giving him double indemnity in case the accident occurred on a public conveyance provided by a common carrier. The court held that although generally the transfer company acted as a common carrier, in this particular case it had accepted a special employment and was operating as a private carrier. The court said:

> "The mere fact that a livery stable man may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack in hauling passengers from a station may be a common carrier and that same hack when it was carrying a traveling man from one town to another may not be a common carrier. In the one instance the passenger has a legal right to passage. In the other instance the traveler has no legal right to make such demand. In this case, under the law, the facts show that in the particular business in which this Transfer Company was engaged when the plaintiff's intestate

> was killed, it was not a common carrier, but only a private carrier for hire."

That case points out very significantly that the same conveyance may be employed in one branch of the service on common carriage and in another branch of the same person's service on private carriage. The court also stressed the feature that Judge Bourquin emphasized in deciding the case at bar, namely, that when a carrier has the right to refuse an order he is not acting as a common carrier but as a private one.

The decision of the Supreme Court in the *Terminal Taxicab* case (supra) was cited in the briefs and followed in a decision of the Pennsylvania Court in the case of

> *Oppenheimer v. Maryland Casualty Co.,* 70 Pa. Sup. 382.

In that case the point involved was similar to the one in the case at bar and the court held that the policy holder could not collect double indemnity when injured on an automobile specially employed for a trip from Wilkes-Barre to Scranton. All of the seven judges that heard the case on appeal concurred in the decision. The court stated that the situation was identical to that of a livery stable keeper who was at liberty to accept or reject employment as he wished. The court said:

> "Neither in form nor in substance can we see that such contract differed in any material way from a similar one made with a livery

stable keeper for the use of a carriage and team of horses."

The Supreme Court of Tennessee reached the same conclusion in the case of

Darnell v. Fidelity & Casualty Insurance Company, Tennessee Supreme Court 1915; 46 Insurance Law Journal, 523; referred to in 9 American Law Reports 1557.

We have been unable to locate the official report of this case as the decision was apparently an oral one and never transcribed. In the above citation from the Insurance Law Journal the statement of the case is given based upon a certified copy of the record. It appears that on a special telephone call to the garage of a taxicab company, a taxicab was sent to a private residence for the purpose of taking four passengers from the residence to the railroad station. The insured was a member of the party and was killed in an accident occurring on the trip. Claim was made against the insurance company upon the ground that the deceased had met her death on a public conveyance provided by a common carrier. The lower court gave judgment for the plaintiff but on appeal the decision was reversed and judgment ordered for the insurance company. It appears from the record in the case that the decision of the Supreme Court in the *Terminal Taxicab* case (supra) was cited and apparently followed.

In the case of

Rathbun v. Ocean Accident & Guaranty Corporation, 132 Northeastern 754 (Ill.).

the court pointed out the distinction existing between a person operating automobiles as a common carrier and one operating them under special contracts as a private carrier. In that case the insurance policy provided for double indemnity for injuries occurring "on a public conveyance provided by a common carrier for passenger service". The insured (a physician) had hired an automobile from a public garage for use in making calls upon his patients and the driver of the automobile was on the seat with him although the assured was driving at the time. The court followed the decision of the Supreme Court in the *Terminal Taxicab* case and held that this was private carriage.

The court said:

> "This question does not necessarily depend on the fact whether or not Rayle Brothers were common carriers in the City of Danville in carrying persons from hotels to trains or from trains to hotels or from place to place within the city limits. While it is not stated in so many words, the clear inference in the record is that the service rendered to Dr. Rathbun was by special contract, and that the service differed in no material way from the character of service ordinarily rendered by livery men in letting teams and carriages to their patrons for trips into the country or from town to town. * * * Livery stable keepers lack one of the essential qualifications * * * a readiness to carry any and all persons who apply. * * * The fact

> that Rayle Brothers were licensed in Danville to run taxicabs, if such be the case, can have nothing to do in determining the question of whether or not they were common carriers in rendering the service in question."

Under certain circumstances, taxicabs are public conveyances and their operators are common carriers. But when the arrangements are private and the contracts are special, the situation is analogous to that of a livery stable keeper who lets out his teams either with or without drivers. He is a private carrier for hire but not a common carrier. See in this behalf

Forbes v. Reiman, 166 Southwestern 563.

In the seventh edition of *Huddy on Automobiles,* page 132, Section 139, the author refers to numerous authorities holding that the business of a garage man furnishing automobiles from his place of business on specific orders of customers is different from the general taxi or jitney business. The former is not deemed the business of a common carrier.

The case is analogous to that of a livery stable keeper who operates as a private carrier. He is not a common carrier. See 10 *C. J.* 608.

The fact that Ward may have been a common carrier in one branch of his business did not preclude him from acting as a private carrier as well. For example, in the case of

Georgia Life Insurance Co. v. Easter (supra),

the court stated that

> "the mere fact that a livery man may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack when carrying passengers from the station may be a common carrier, and that same hack when it is carrying a travelling man from one town to another may not be a common carrier. In one instance the passenger has a legal right to demand passage. In the other instance the travelling man has no legal right to make such demand."

Applying the last quotation to the case at bar, it becomes apparent that Ward was acting as a private carrier. The day was a stormy one; Ward had no machines operating in the direction of the farm; his last regular run to Clevedon had been completed. It was optional with him whether he should send out an automobile six miles off of his regular run and at that hour of the day and transport the party from the farm to Papakura. Most assuredly he could have refused, but when he accepted he did so by special contract and in that branch of his business in which he hired out cars with drivers for private use (see transcript pages 41, 42, 43, 44, 45).

The *Terminal Taxicab* case was referred to by Judge Cushman in the case of

> *Puget Sound International Railway v. Kuykendall*, 293 Fed. 791 at page 796,

where the court said:

> "'That a company furnishing from its garage automobiles for service on order, gener-

> ally by telephone, was free to refuse the employment, and was as to such service a private carrier." (Citing Terminal Taxicab Co. v. Kutz, 241 U. S. 252.)

There is nothing to prevent a common carrier from making a special contract pursuant to which he acts as a private carrier. It was so held by the Supreme Court in the case of

> *Santa Fe & Central Railway v. Grant Brothers,* 228 U. S. 177; 58 L. Ed. 787.

A common carrier may act as private carrier as a matter of accommodation or by special arrangement, 4 R. C. L. 550; but in acting as a private carrier the obligations differ from those of a common carrier; 4 R. C. L. 549.

Reviewing the facts briefly, we find the following:

The elements of a common carrier were lacking; Ward accepted a special contract and was not operating by virtue of regular service established for the public. He accepted an employment six miles off of his regular run and two hours after his last regular run for the day was completed. He accepted the employment in his capacity as a private carrier and could have refused to do so had he wished. The entire arrangement was a special one—one of private carriage and consequently Mrs. Chenery did not meet her death while being transported in a public conveyance provided by a common carrier for passenger service.

II.

NO JURY QUESTION WAS INVOLVED IN THE CASE AT BAR.

The brief of the plaintiff in error contains an abundant citation of authorities in support of the elementary principle that when evidence is conflicting the case should be sent to the jury. There is no dispute upon that proposition and the citation of authorities needless. Upon the other hand, it is equally well established that when there is no substantial evidence to sustain plaintiff's case, the court should direct a verdict for the defendant.

38 *Cyc.* pages 1533-1536.

The editors state:

> " * * * It is held that if there is no evidence in the case from which the jury can properly find in favor of a party upon whom rests the burden of proof, or if there is no more than a mere scintilla of evidence, or where the evidence is free from conflict and admits of but one conclusion, the Court should withdraw the case from the jury. So it has been very generally held that if the facts are admitted, or only one inference can reasonably be deduced therefrom * * * the Court should withdraw the case from the jury. * * * Where the sole question is one of law, it is proper for the Judge to discharge the jury and decide the case."

All these statements are supported by abundant authority.

In the *Estate of Sharon,* 179 Cal. 447, the court said, pages 459-60:

"It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. There are numerous decisions to this effect (citing cases).

"Many other cases supporting the rule are cited in the Baldwin case. This rule would sustain the action of the court below even if it were conceded that there was some conflict in the evidence relating to the jurisdictional facts essential to a valid adoption. The conflict, if any, was beyond question not substantial, but was a mere shadow of form without substance. The objection that the court had not the power is consequently without merit."

In view of the familiarity of the court with these principles, we will not cite additional authorities in support of these propositions. In the case at bar, there was no conflict in the testimony. The facts were not in dispute. It was purely a question of law whether on the undisputed evidence Ward was or was not a common carrier in driving the automobile at the time of the accident. The testimony showed without conflict that he was driving pursuant to the branch of his business where he made special contracts on special occasions for private carriage. Consequently, there is no occasion to comment upon the cases cited on Divisions II and III

of our opponent's brief regarding the question of procedure.

III.

THE CASES CITED IN DIVISION IV OF OUR OPPONENT'S BRIEF DO NOT MEET THE ISSUE.

The first dozen cases cited in Division IV of plaintiff's brief do not meet the situation. They contain definitions of common carriers and a discussion of the relation of taxicabs and motor busses to the status of common carrier. It is not disputed that taxicabs are frequently operated as common carriers. But as the Supreme Court pointed out in the *Terminal Taxicab Co.* case (supra), a taxicab may be furnished for private carriage as well as for common carriage. Our opponents have entirely overlooked the distinction pointed out by Justice Holmes in that case. And in deciding the case at bar, Judge Bourquin did not question the fact that a taxicab owner might be a common carrier on certain occasions. But following the decision of the Supreme Court, he held that the undisputed evidence in the case at bar showed that the Dodge automobile at the time of the accident was being operated by Ward in his capacity as a private carrier, although in another branch of his business he had a regular run between Clevedon and Papakura and was doubtless a common carrier.

Several insurance cases have been cited in this division of plaintiff's brief in support of his con-

tention but an examination of these cases shows that in the main they do not support his contention or are in conflict with the decision of the United States Supreme Court. Plaintiff has cited the *Primrose* case on page 24 of his brief as the case he chiefly relies upon. But the policy in that case differed radically from the one in the case at bar. In the cited case, the policy provided for recovery in case of injury on a "public conveyance for passenger service propelled by gasoline". Of course, that is radically different from the case at bar. In the case at bar, the conveyance must be provided by a common carrier whereas in the cited case the words "common carrier" are not used. It is merely provided in the cited case that the conveyance must be a public one "propelled by gasoline". Furthermore, the *Primrose* case is in conflict with the later Pennsylvania decision in *Oppenheimer v. Maryland Casualty Co.,* 70 Pa. Sup. 382. The *Primrose* case was decided before the decision of the Supreme Court in the *Terminal Taxicab* case and it has subsequently been criticised in other cases as being too broad in the language used. In the case of *Anderson v. Fidelity Casualty Co.,* 127 Northeastern 584, the court stated that "it may be that the (Primrose) decision was too broad in that it applied to rented automobiles under contract for a day or an hour or other specified time" and in the concurring opinion of Judge Hiscock he pointed out that the taxicab involved in the *Primrose* case was probably a "cruiser" and common carrier and

not one hired from a garage under special contract. But, as we indicated above, in the *Primrose* case the question of common carrier was really not involved at all.

The next case cited by the plaintiff is *Fidelity & Casualty Co. v. Joiner* (brief page 26), a decision of the Texas Court of Appeals. That decision is out of line with all other authorities on the principles involved. In substance, it holds that a livery stable keeper is a common carrier. In that behalf the case stands alone for it is elsewhere held without conflict that such is not his status. See 10 *C. J.* 608 where the editors state:

> "A livery stable keeper does not hold himself out to serve any and all persons; but operates only under a special contract, and deals with such persons only as he chooses, and is in no sense a common carrier."

The case was decided before the decision of the Supreme Court in the *Terminal Taxicab* case. We respectfully submit that when analyzed it cannot be regarded as an authority in support of any of plaintiff's contentions in the case at bar.

The next case cited by our opponent is *Anderson v. Yellow Cab Co.* (brief page 27); but that is not an insurance case and merely holds that under certain circumstances the operator of a taxicab may be a common carrier. The court expressed an unwillingness to follow the decision of the Supreme Court in the *Terminal Taxicab* case and conse-

quently if there is any conflict the decision of the United States Supreme Court controls here. But even in the cited case, it is conceded that a taxicab company may make a bargain for private carriage. The real point of the case seems to involve the degree of care required of the taxicab operator, and the court held the defendant to the highest degree of care "whether in a strictly technical sense defendant can be regarded as a common carrier of passengers or not."

The next case cited by plaintiff is *Anderson v. Fidelity & Casualty Co.* (brief page 29). But in that case, concededly the taxi driver was operating as a common carrier. As we pointed out above, the court in this case did not undertake to hold that every taxicab operator was to be regarded as a common carrier and specifically stated that the language of the *Primrose* case was too broad. We particularly refer in that behalf to the concurring opinion of Chief Justice Hiscock who makes the same distinction between taxis operating as private carriers and those operated as common carriers that was made by the Supreme Court in the *Terminal Taxicab* case.

The *Dunn* case, cited on page 30 of plaintiff's brief was concededly a common carrier case—a steamboat regularly plying between "two specified pleasure resorts".

The *Berliner* case cited on page 30 of plaintiff's brief is not analagous in any particular to the case

at bar. The only question involved there was whether a policy holder was riding as a passenger when at the time of the injury he was in the locomotive at the invitation of the superintendent of the railway. The case is quite beside the mark.

In the latter portion of subdivision IV of plaintiff's brief, counsel have evidently confused the issues in the case at bar with those involved in other cases. There is no question of policy construction involved here. The language is clear and free from all doubt as to its meaning. Nor is it a case of "exceptions" which "devour the whole policy". On the contrary, the beneficiary endorsement is the insuring clause. It gives a limited form of insurance to the beneficiary which is "thrown in" by insurance companies in addition to the main insurance. If the beneficiary qualifies under the beneficiary endorsement, the insurance attaches; otherwise it does not. But this is not a case of an "exception" limiting other and broader insurance.

It is stated in plaintiff's brief that Ward was carrying a newspaper and a loaf of bread on the trip. We are at a loss to understand why this is adverted to for it has no bearing on the case, for even if the automobile involved in the accident was being used as a common carrier of freight, the plaintiff could not recover as the policy allows recovery only in case of injury upon a conveyance "provided by a common carrier *for passenger service*" (Transcript page 72).

In Subdivision II of plaintiff's brief, the statement is made that Ward never "asserted the right to refuse the service". But that is quite immaterial. A private carrier may consistently accept every offered employment so long as he has the facilities, but this does not make him a common carrier for he still has the right to refuse if he wishes to do so. In that behalf in the *Terminal Taxicab Co.* case (supra) the taxicab company was held to be a private carrier in one branch of its business in spite of the fact that "it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer"; the court said:

> "still the bargains are individual * * *. There is no contract with a third person to serve the public generally. * * * There seems to be no difference between plaintiff's service from its garage and that of a livery stable. A private shopkeeper may serve every customer that wishes to buy his wares, yet he is not obligated to do so and may at any time and for any reason refuse a prospective customer."

IV.

THE RULINGS ON QUESTIONS OF EVIDENCE WERE CORRECT.

At the end of the brief it is suggested, rather timidly, that the court ruled erroneously on certain questions of evidence. But such is not the case. The court refused to admit testimony calling for the legal conclusions of the witnesses, and also re-

fused to admit hearsay testimony—conversations between Ward and third persons in the absence of the defendant or its agents. The questions were also leading.

Plaintiff also objected to certain questions propounded by the defendant upon *cross-examination* of witnesses called by plaintiff. Counsel overlooks the fact that the witnesses were called by him and that defendant was entitled to the latitude allowed by the court on cross-examination.

In Conclusion.

There was only one issue involved in the case at bar and that is whether at the time of the accident Ward was operating the Dodge car as a common carrier. The evidence is clear and undisputed. He was not accustomed to operate automobiles out toward the farm except on special employment, nor wtihout special contract did he operate any automobiles after 3:30 in the afternoon. This was at 5:30 and after his last regular run for the day was over; it was a special contract to convey a party from a point six miles off of his regular run to Papakura and after his regular runs for the day were over. It was a part of his business to accept special calls for transportation at special rates and pursuant to arrangements specially made in that behalf. This is private, not common carriage, and it was in his capacity as a private carrier that Ward accepted the

employment. There was nothing for the jury to pass on—the facts were undisputed and if a verdict had been returned for the plaintiff it would have been necessary for the trial court to set it aside. For these reasons, we submit that the judgment should be affirmed.

Dated, San Francisco,
March 20, 1925.

Respectfully submitted,
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